Supreme Court, U. S.
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IN THE

Supreme Court of the United States

April Term, 1978

No. 77-1523

JACK C. MILLER,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

8 TANKS, 308 DOSES AND 1 AMPULE OF BULL SEMEN
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

APRIL TERM, 1978

NO. _____

JACK C. MILLER
Petitioner

VS.

UNITED STATES OF AMERICA
Respondent

_____

8 TANKS, 308 DOSES AND 1 AMPULE OF BULL SEMEN
Petitioner

VS.

UNITED STATES OF AMERICA
Respondent

_____

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

The Petitioner, Jack C. Miller, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in this proceeding on February 22, 1978.

OPINIONS BELOW

The only opinion rendered in this matter was a Memorandum, Opinion and Order by the District Court; this Opinion, not reported, is set forth in Appendix A to this Petition. No opinion was rendered by the Court of Appeals; its judgment order, affirming the judgment of the District Court, is likewise set forth in Appendix A.

JURISDICTION

The Judgment of the Court of Appeals (Appendix A, infra, pp. 3A-4A was entered on February 22, 1978. On March 23, 1978, Justice Brennan signed an Order extending the time for filing this Petition for Writ of Certiorari to and including April 23, 1978, for the action styled JACK C. MILLER VS. UNITED STATES OF AMERICA; this Order is set forth in Appendix B to this Petition. The civil action styled 8 TANKS, 308 DOSES AND 1 AMPULE OF BULL SEMEN VS. UNITED STATES OF AMERICA is timely filed. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Is a thirty-eight (38) month delay between the date of seizure of alleged contraband and the institution of a forfeiture complaint against such contraband too long a period of time within the requirements of 19 U.S.C., Sec. 1604 and the constitutional requirements of Due Process?
2. What evidence must the government show to prove the illegal entry required for seizure under 18 U.S.C., Sec. 545, 19 U.S.C., Sec. 1460 and 19 U.S.C., Sec. 1952, and what evidence must the government show to establish which merchandise is contraband subject to that seizure?
3. What evidence must the government show to allow confiscation of both the alleged contraband and other items which were stored with this contraband, under 19 U.S.C., Sec. 1952?
4. Is the granting of forfeiture of the bull semen which is the subject of this Appeal so harsh a penalty as to shock the conscience of this Court and subject the Petitioner to double jeopardy?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

"No person shall . . . be deprived of life,
liberty, or property, without Due Process of Law. . ."

The relevant statutes setting forth the applicable laws regarding smuggling and forfeiture of seized contraband are 18 U.S.C., Sec. 545, 19 U.S.C., Sec. 1460, 1462, 1592, 1602, 1604, 1615 and 28 U.S.C., Sec. 2642. These are reprinted in pertinent part in Appendix C, pp. 6A, infra.

STATEMENT OF THE CASE

Jack C. Miller was indicted for conspiracy to violate Title 18, United States Code, Sec. 542, 545 and 2315. Pursuant to a search warrant, Agents of the Bureau of Customs, on November 23, 1973, entered the home of Jack C. Miller and seized eight (8) canisters of bull semen.

On April 30, 1974, Jack C. Miller plead guilty before the Honorable Charles R. Weiner and was sentenced to three (3) months imprisonment and a five (5) year probationary sentence upon his release. On January 21, 1977, Jack C. Miller petitioned for the return of the eight (8) canisters of bull semen and the United States of America filed an Answer opposing the return. On February 11, 1977, the government's attorney filed a Petition for Forfeiture of the Bull Semen, which Jack C. Miller answered.

The two cases were consolidated for hearing. An evidentiary hearing was held on April 27, 1977, and thereafter the Court filed an Opinion and Order on June 6, 1977, granting a forfeiture on the complaint of the United States Attorney and denying and dismissing the Petition of Jack C. Miller for the return of his property. A consolidated Appeal was taken by Jack C. Miller to the United States Court of Appeals for the Third Circuit which affirmed the District Court's Order without opinion.

REASONS FOR GRANTING THE WRIT

1. The decisions below, relating to the delay between seizure and the institution of forfeiture proceedings, directly violate the Due Process provisions of the Fifth Amendment and Title 19, U.S.C., Sec. 1604.

The Fifth Amendment provides, in pertinent part, that

"No person shall . . . be deprived of life,
liberty, or property, without due process of law. . ."

The seizure of the Petitioner's eight (8) canisters of bull semen has

deprived the Petitioner of his property and his sole livelihood, without prompt judicial proceedings.

In 1970, this Court, while recognizing the popular fiction that a forfeiture proceeding was in rem, held nevertheless that some constitutional rights attach to such proceedings as if it were a criminal proceeding. U.S. VS. COINS & CURRENCY, 401 U.S. 715 (1970). Since that decision, all Courts faced with the issue of whether or not to apply a "speedy trial provision" or "laches" to forfeiture proceedings have done so because of the constitutional implications of Due Process. U.S. VS. QUANTITY OF GOLD JEWELRY, 379 F. Supp. 283 (D.C. Calif. 1974); SARKISIAN VS. U.S., 472 F 2d 468, cert. denied 414 U.S. 976 (10th Cir. 1973); U.S. VS. ONE MOTOR YACHT NAMED MERCURY, 527 F 2d 1112 (1st Cir. 1975); BOSTON VS. STEPHENS, 395 F. Supp. 1000 (D.C. Ohio 1975). See also TRUTH SEEKER CO. VS. DURNING, 147 F 2d 54 (2nd Cir. 1945).

In the leading case of SARKISIAN VS. U.S., supra, the claimant raised several issues in his appeal, including the constitutional implications of delay. The Tenth Circuit, in considering the issue, likened the property rights to be protected under Fifth Amendment Due Process to the First Amendment interests to be protected under U.S. VS. THIRTY-SEVEN PHOTOGRAPHS, 402 U.S. 363 (1971). The Tenth Circuit recognized the high regard in which property rights are held. See eg. FUENTES VS. SHEUIN, 407 U.S. 67 (1972). The Court construed 19 U.S.C., Sec. 602-604, governing the government's institution of forfeiture, as requiring prompt action and held a nine-month delay by the United States Attorney is too long. The court ordered that claimant's property be returned. See also STATES MARINE LINES, INC. VS. SCHULTZ, 498 F 2d 1146 (4th Cir. 1974); U.S. VS. ONE 1971 OPEL GT, 360 F. Supp. 638 (D.C. Calif. 1973) (holding 13½ month delay too long).

The Court in U.S. VS. ONE 1971 OPEL GT, supra, went on to say that the seizing customs officer must immediately report the seizures to the collectors and the U.S. Attorney must "forthwith" institute Court proceedings.

> "These . . . statutory constructions may be necessary to avoid what may be the unconstitutionality of the statutes on its face under the Due Process Clause."

360 F. Supp. at 642 nt. 2 (emphasis supplied by the Court).

The District Court in U.S. VS. ONE 1971 OPEL GT, supra, also found that the statutes (19 U.S.C., Sec. 602, et seq.) were unconstitutional as applied because of the 13½ months delay. The Court found that the delay could not be excused as attributable to the claimant for that would foreclose the claimant from his remedies. In this

view, the Court is joined by other Courts, all holding delays 12 months or less as too long. See SARKISIAN, supra and cases cited therewith. Such property, not being contraband per se, should be returned.

In the instant case, the Petitioner has been deprived of his property and sole livelihood since November, 1973. The government failed to promptly institute proceedings as was required of it under 19 U.S.C., Sec. 1604. Further, this delay results in the statutes being an unconstitutional deprivation of Due Process as applied to these facts. The government has an obligation to promptly institute these proceedings because, until they are adjudged forfeit, the claimant has a property interest in these items. Because of this delay, claimant has been deprived by the government of his property rights without prompt judicial proceeding.

2. The decisions below, as to the allowable delay between seizure and forfeiture, directly conflict with the holdings in SARKISIAN VS. U.S., 472 F 2d 468, cert. denied, 414 U.S. 1976, (10th Cir. 1973), STATES MARINE LINES, INC. VS. SHULTZ, 498 F 2d 1146 (4th Cir. 1974), and U.S. VS. ONE 1971 OPEL GT, 360 F. Supp. 638 (D.C. Calif. 1973).

The issue raised by this conflict is of continuing importance and should be resolved by the Supreme Court.

The Court below found that a 38 month delay on the part of the government between seizure of alleged contraband and the institution of forfeiture proceedings against the contraband was constitutionally allowed. The 10th Circuit, in SARKISIAN, supra, held that a 9 month delay in forfeiture proceedings was a violation of Fifth Amendment Due Process and the directions of 19 U.S.C., Sec. 602-604. Meanwhile, the California District Court was finding a delay of 13½ months excessive. U.S. VS. ONE 1971 OPEL GT. Later, the 4th Circuit, in STATES MARINE LINES, INC. VS. SHULTZ, supra, further muddied the waters by holding that a period of over 12 months was too long a delay.

The Petitioner contends that a reasonable time limitation should be promulgated by this Court to finally decide the question of the allowable time period between seizure and forfeiture of alleged contraband. Certainly a period of 38 months is grossly excessive and a period which corresponds to the time periods established in other Courts of Appeals would be reasonable. Until such a resolution of this problem occurs, there will continue to exist a vague, varying and questionable standard between the various Federal jurisdictions as to the time period allowed the Custom's Office to proceed against alleged contraband merchandise.

3. The decisions below, allowing forfeiture by the government with-

out proof of the actual contraband merchandise, violate the Due Process provisions of the Fifth Amendment.

As stated earlier, the Fifth Amendment requires Due Process of law before a person can be deprived of his property. In this case the government failed to identify any of the following:

1. The actual bull semen which was smuggled across the border;
2. The bull semen which was declared and which was co-mingled with the unlawful bull semen to smuggle the contraband bull semen across the border; and
3. That any of the seized bull semen constituted either part of #1 or #2 above.

Despite this failure, the lower Courts found for the government, flying in the face of the requirement that the government must prove that the property was brought into the United States without the required papers and that the requirement that proof of entry is essential. ONE EMERALD CUT STONE AND ONE RING VS. U.S., 409 U.S. 232 (1972) (per curiam); ORIGENT VS. U.S., 125 U.S. 240 (1888) (construing Sec. 12 of Act of 1874, now 19 U.S.C. Sec. 1592). The government cannot seize other shipments or inventory to which no fraudulent entry attaches, nor may these then be forfeited. JEN DAO CHEN VS. U.S., 385 F 2d 939 (9th Cir. 1967).

The result of the lower Court's decision is that the Petitioner's property was taken from him without Due Process of law. While there was a hearing, the failure of the government to present any evidence identifying the seized bull semen as contraband, the lower Court's finding in light of this failure, must negate any appearances of Due Process.

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals in the instant case raises questions of general importance in the administration of the Customs Laws of the United States, which, considering the conflicting opinions of other Federal jurisdictions, should be reviewed by this Court. The Petitioner believes that it is in the public interest that a definitive answer to these conflicts be secured in this Court.

RESPECTFULLY SUBMITTED,

HENRY T. CROCKER
Attorney for Petitioner

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Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
vs.	:	CIVIL ACTION NO. 77-518
	:	
8 TANKS, 308 DOSES AND	:	
1 AMPULE OF BULL SEMEN	:	
IN THE MATTER OF THE APPLI-	:	
CATION OF JACK C. MILLER FOR	:	
AN ORDER DIRECTING THE	:	CRIMINAL NO. 74-149
RELEASE OF CERTAIN INVEN-	:	
TORY OF EIGHT (8) CANISTERS	:	
OF BULL SEMEN	:	

MEMORANDUM, OPINION AND ORDER

WEINER, J. JUNE 6, 1977

In Criminal Action No. 74-149, petitioner, Jack C. Miller, has presented to the Court a motion seeking the return of eight (8) canisters of bull semen seized by the Bureau of Customs of the U. S. Treasury Department. In Civil Action No. 77-518, the Government has filed a complaint in forfeiture of the aforesaid items.

On November 23, 1973, the eight canisters of bull semen were seized at the Miller premises and retained as evidence in criminal proceedings charging Miller with the receipt, storage and concealment of smuggling bull semen into the United States in violation of Title 18 U.S.C. §§545 and 2315. On April 30, 1974, Miller entered a plea of guilty to the aforesaid charges and was sentenced to a term of imprisonment and a successive period of probation.

Alleging that the seized bull semen constituted a part of the smuggled merchandise, the Government seeks forfeiture. Arguing that only a small identifiable portion of the confiscated bull semen was involved in the illegal smuggling and that despite the co-mingling of the lawful with the smuggled semen, an accurate determination can be made and the so-called lawful semen separated from that smuggled, petitioner seeks return of those contents of the canisters which contained the lawfully imported semen.

Predicated upon the pleadings, our recollection of the testimony and notes taken at trial, the Court decrees forfeiture and denies the petition to return the seized merchandise.[1]

We believe that the decisive fact in impelling our conclusion is the uncontradicted statement of treasury agent Lorato who testified that Miller acknowledged the intermingling of smuggled semen with legitimate semen, accomplished for the specific purpose of avoiding payment of duty tax. It is unlawful to have or possess any property intended for use in violating provisions of internal revenue laws does not refer to intention to evade tax, but the use to which property is to be put. U.S. V. U.S. Currency in Amount of $2,813.37, 264 F. Supp. 394 (M.D. Pa. 1966). We see no reason that this principle should not apply to avoidance of a duty tax. Since the property seized was intended to be used and was used in violation of custom tax laws, any property so used sanctions forfeiture thereof. cf. U.S. V. One 1965 Buick, 397 F2d 782 (Cir. 1968); U.S. V. One 1962 Cadillac, 397 F2d 796 (Cir. 1968); Marderosian V. U.S., 337 F2d 759 (Cir. 1964) CERT. DENIED, 380 U.S. 971 (1965). Accordingly the Court enters the following Order.

ORDER

In Civil Action No. 77-518 judgment is entered in favor of the plaintiff and it is decreed that forfeiture of the items described in the complaint is Granted and the aforesaid items shall be disposed of by the District Director of Customs, Philadelphia, Pennsylvania, pursuant to law.

In Criminal Action No. 74-149, the petition of Jack C. Miller for the return of aforesaid items is Denied.

IT IS SO ORDERED.

CHARLES R. WEINER

1. On April 27, 1977, the Court conducted an evidentiary hearing to resolve any disputed issues of fact. Unfortunately neither counsel has requested that the testimony be transcribed. In addition, the Court does not appreciate nor does it comprehend respective counsels' failure or neglest to have submitted a memorandum of law in support of their claims.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 77-1865 - 77-1964

UNITED STATES OF AMERICA

v.

JACK C. MILLER, ALBERT JOHN BALL,

Jack C. Miller, owner of 8 tanks,
308 doses and 1 ampule of bull semen,
Appellant in No. 77-1865

(D.C. Crim. No. 74-149)

UNITED STATES OF AMERICA

vs.

8 TANKS, 308 DOSES AND 1 AMPULE OF BULL SEMEN,

Jack C. Miller, owner of 8 tanks,
308 doses and 1 ampule of bull semen,
Appellant in No. 77-1964

(D.C. Civil No. 77-518)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

Submitted Under Third Circuit Rule 12(6)
February 17, 1978
Before GIBBONS, HUNTER, Circuit Judges, and
STAPLETON,* District Judge

*Honorable Walter K. Stapleton, United States District Judge for the District of Delaware, sitting by designation.

David W. Marston, United States Attorney

Walter S. Batty, Jr., Assistant United States Attorney, Chief, Appellate Division

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Attorney for Appellant

JUDGMENT ORDER

Appellant Miller filed a petition for return of seized property in a criminal case. The government filed a separate civil complaint in forfeiture. A hearing covering both proceedings resulted in the entry of a judgment of forfeiture in the civil proceeding and the denial of Miller's reclamation petition in the criminal case. Miller contends: (1) that the government unduly delayed in commencing the forfeiture proceeding; (2) that the government did not prove a case for forfeiture; and (3) that the Court should not have ordered forfeiture of co-mingled goods. We find no error.

It is therefore ORDERED and ADJUDGED that the judgment of the district court is affirmed. Costs taxed in favor of appellee in No. 77-1964.

By the Court,

JOHN J. GIBBONS,
Circuit Judge

Attest
Thomas F. Quinn,
Clerk

Dated: Feb.22, 1978

Appendix B

SUPREME COURT OF THE UNITED STATES

No. A-806

JACK C. MILLER, OWNER OF 8 TANKS, 308 DOSES,
1 AMPULE OF BULL SEMEN,

Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR
WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 23, 1978.

/s/ William J. Brennan, Jr.

Associate Justice of the Supreme
Court of the United States

Dated this 23
day of March, 1978

Appendix C

Title 18, Section 545.

Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law—

Shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.

Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States.

The term "United States", as used in this section, shall not include the Philippine Island, Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island or Guam. June 25, 1948, c. 645, 62 Stat. 716; August 24, 1954, c. 890, Section 1, 68 Stat. 782; Sept. 1, 1954, c. 1213, Title V, Section 507, 68 Stat. 1141; June 30, 1955, c. 258, Section 2(c), 69 Stat. 242.

Title 19, Section 1602.

It shall be the duty of any officer, agent, or other person authorized by law to make seizures of merchandise or baggage subject to seizure for violation of the customs laws, to report every such seizure immediately to the collector for the district in which such violation occurred, and to turn over and deliver to such collector any vessel, vehicle, merchandise, or baggage seized by him, and to report immediately to such collector every violation of the customs laws. June 17, 1930, c. 497, Title IV, Section 602, 45 Stat. 754.

Title 19, Section 1604.

It shall be the duty of every United States attorney immediately to inquire into the facts of cases reported to him by customs officers and the laws applicable thereto, and if it appears probable that any fine, penalty, or forfeiture has been incurred by reason of such violation, for the recovery of which the institution of proceeding in the United States district court is necessary, forthwith to cause the property proceedings to be commenced and prosecuted, without delay, for the recovery of such fine, penalty, or forfeiture in such case provided, unless, upon inquiry and examination, such United States attorney decides that such proceedings cannot probably be sustained or that the ends of public justice do not require that they should be instituted or prosecuted, in which case he shall report the facts to the Secretary of the Treasury for his direction in the premises. (June 17, 1930, ch. 497, Title IV, Section 604, 46 Stat. 754; June 25, 1948, ch. 646, Section 1, 62 Stat. 869; June 2, 1970, Pub. L. 91-271, Title III, Section 301(bb), 84 Stat. 291.)

Title 19, Section 1592.

If any consignor, seller, owner, importer, consignee, agent or other person or persons enters or introduces or attempts to enter or introduce, into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance whatsoever, or makes any false statement in any declaration under the provisions of section 485 of this Act (Section 1485 of this title) (relating to declaration on entry) without reasonable cause to believe the trust of such statement, or aids or procures the making of any such false statement as to any matter material thereto (without reasonable cause to believe the truth of such statement,) whether or not the United States shall or may be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, declaration, affidavit, letter, paper, or statement; or is guilty of any willful act or omission by means whereof the United States is or may be deprived of the lawful duties of any portion hereof accruing upon the merchandise or any portion thereof, embraced or referred to in such invoice, declaration, affidavit, letter, paper, or statement, or affected by such act or omission, such merchandise, or the value thereof, to be recovered from such person or persons, shall be subject to forfeiture, which forfeiture shall only apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles of merchandise to which such fraud or false paper or statement relates. The arrival within the territorial limits of the United States of any merchandise consigned for sale and remaining the

property of the shipper or consignor, and the acceptance of a false or fraudulent invoice thereof by the consignee or the agent of the consignor, or the existence of any other facts constituting an attempted fraud, shall be deemed, for the purposes of this section, to be an attempt to enter such merchandise notwithstanding no actual entry has been made or offered. (June 17, 1930, c. 497, Title IV, Part V, Section 592, 46 Stat. 750; Aug. 5, 1935, c. 438, Title III, Section 304(b), 49 Stat. 527.)

Title 19, Section 1460.

The master of any vessel or the person in charge of any vehicle who fails to report arrival in the United States as required by section 1459 of this title, or if so reporting proceeds further inland without a permit from the proper customs officer, shall be subject to a penalty of $100 for each offense. If any merchandise is imported or brought into the United States in any vessel of vehicle, or by any person otherwise than in a vessel or vehicle, from a contiguous country, which vessel, vehicle, or merchandise is not so reported to the proper customs officers; or if the master of such vessel or the person in charge of such vehicle fails to file a manifect for the merchandise carried therein, or discharges or lands such merchandise without a permit; such merchandise and the vessel or vehicle, if any, in which it was imported or brought into the United States shall be subject to forfeiture; and the master of such vessel or the person in charge of such vehicle, or the person importing or bringing in merchandise otherwise than in a vessel or vehicle, shall, in addition to any other penalty, be liable to a penalty equal to the value of the merchandise which was not reported, or not included in the manifest, or which was discharged or landed without a permit. If any vessel or vehicle not so reported carries any passenger; or if any passenger is discharged or landed from any such vessel or vehicle before it is so reported, or after such report but without a permit; the master of the vessel or the person in charge of the vehicle shall, in addition to any other penalty, be liable to a penalty of $500 for each passenger so carried, discharged, or landed.

Title 19, 1615.

In all suits or actions brought for the forfeiture of any vessel, vehicle, merchandise, or baggage seized under the provisons of any law relating to the collection of duties on imports or tonnage, where the property is claimed by any person, the burden of proof shall lie upon such claimant; and in all suits or actions brought for the recovery of the value of any vessel, vehicle, merchandise, or baggage, because of violation of any such law, the burden of proof shall be upon the defendant: PROVIDED, That probable cause shall be first shown for the institu-

tion of such suit or action, to be judged by the court, subject to the following rules of proof:

(1) The testimony or deposition of the officer of the customs who has boarded or required to come to a stop or seized a vessel or vehicle, or has arrested a person, shall be prima facie evidence of the place where the act in question occurred.

(2) Marks, labels, brands, or stamps, indicative of foreign origin, upon or accompaying merchandise or containers of merchandise, shall be prima facie evidence of the foreign origin of such merchandise.

(3) The fact that a vessel of any description is found, or discovered to have been, in the vicinity of any hovering vessel and under any circumstances indicating contact or communication therewith, whether by proceeding to or from such vessel, or by coming to in the vicinity of such vessel, or by delivering to or receiving from such vessel any merchandise, person, or communication, or by any other means effecting contact or communication therewith, shall be prima facie evidence that the vessel in question has visited such hovering vessel. (June 17, 1930, ch. 497, Title IV, Section 615, 45 Stat. 757; Aug. 5, 1935, ch. 438, Title II, Section 207, 49 Stat. 525).

Title 19, Section 1462.

If such owner, agent, or other person shall fail to comply with his demand, the officer shall retain such trunk, traveling bag, sack, valise, or other container or closed vehicle, and open the same, and, as soon thereafter as may be practicable, examine the contents, and if any article subject to duty or any article the importation of which is prohibited is found therein, the whole contents and the container or vehicle shall be subject to forfeiture. June 17, 1930, c. 497, Title IV, Section 462, 45 Stat. 718.

Title 28, Section 2642.

The Customs Court under its rules and in its discretion may permit amendments of protests, appeals for reappraisement, applications for review, petitions for remission and pleadings. Added May 24, 1949, c. 139, Section 123, 63 Stat. 106.

Supreme Court, U. S.
FILED
JUN 14 1978
MICHAEL RODAK, JR., CLERK

No. 77-1523

In the Supreme Court of the United States

OCTOBER TERM, 1977

JACK C. MILLER, CLAIMANT OF 8 TANKS, 308 DOSES AND 1 AMPULE OF BULL SEMEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1523

JACK C. MILLER, CLAIMANT OF 8 TANKS, 308 DOSES AND 1 AMPULE OF BULL SEMEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion and order of the district court (Pet. App. 1A-2A) is not reported. The court of appeals rendered no opinion.

JURISDICTION

The judgment of the court of appeals (Pet. App. 3A-4A) was entered on February 22, 1978. Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to April 23, 1978 (a Sunday), and on April 24, 1978, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the delay between the seizure of eight canisters of bull semen and the institution of civil forfeiture proceedings required dismissal of the forfeiture action.

STATEMENT

1. During a 12-month period ending November 16, 1973, petitioner was involved in a conspiracy whereby certain employees of the United Breeders of Guelph, Ontario, would steal from that company quantities of bull semen and sell it to petitioner, who would smuggle it into the United States (App. 34-41).[1] In November 1973 petitioner was arrested by Canadian authorities and charged with theft of bull semen (App. 61, 68-69). On the basis of information received from the Canadian authorities, county detectives of Montgomery County, Pennsylvania, obtained a search warrant, and, on November 21, 1973, searched petitioner's residence in that county and seized eight canisters of frozen bull semen (App. 52-55). The semen was turned over to the United States Customs Service on November 23 (App. 57) and retained as evidence in federal criminal proceedings charging petitioner with receipt, storage, and concealment of smuggled bull semen (App. 6).

2. By letter dated February 19, 1974, petitioner was informed by the Bureau of Customs that eight canisters of bull semen had been seized for violation of the United States Customs and related laws and that the penalties incurred were forfeiture of the seized articles and the payment of $7,765.60 in duty (App. 10). The letter further

[1]"App." refers to the Appendix filed by petitioner in the court of appeals.

advised petitioner of his right, under Section 618 of the Tarriff Act (49 Stat. 757, as amended, 19 U.S.C. 1618), to file a petition in remission or mitigation of the penalty. Petitioner failed to do so.

On March 19, 1974, after receiving *Miranda* warnings, petitioner gave a complete statement to Customs officials, detailing the circumstances of his smuggling activity (App. 34-42). He admitted that the semen contained in the eight canisters seized by Customs had been brought into the United States on at least seven separate occasions during the preceding year. He further stated that when entering the United States he would commingle in the canisters ampules of bull semen he had legitimately purchased in Canada with ampules that had been stolen, declaring only the former to Customs (App. 34-36).

On April 30, 1974, petitioner pleaded guilty in the United States District Court for the Eastern District of Pennsylvania to conspiracy (Count I) and to receiving and concealing smuggled goods (Count II) in violation of 18 U.S.C. 371 and 545. He was sentenced to three months' imprisonment on Count I. The sentence on Count II was suspended and petitioner was placed on five years' probation. In addition, a fine of $10,000 was imposed (App. 8).

3. In February 1977 petitioner filed a petition in the United States District Court of the Eastern District of Pennsylvania for return of the eight canisters of bull semen that had been seized by state authorities on November 21, 1973, and turned over to the Bureau of Customs of the United States Treasury Department (App. 5-9). On February 11, 1977, the government filed a civil complaint for forfeiture of the canisters (App. 17-20).[2] On

[2]The complaint alleged that the semen was subject to forfeiture under 19 U.S.C. 1592 and 18 U.S.C. 545. Under 19 U.S.C. 1592, any imported merchandise introduced into the commerce of the United

June 6, 1977, the district court denied the motion for return of the canisters in the criminal action, and entered a judgment of forfeiture in the civil proceeding (Pet. App. 1A-2A). The court of appeals affirmed (Pet. App. 3A-4A).

ARGUMENT

Petitioner argues (Pet. 3-5) that the delay of 38 months between the seizure of the semen and the institution of civil proceedings violated due process. At the outset, we note that petitioner failed to raise this objection in the district court (App. 27-30). On the contrary, he expressly conceded that some of the seized semen was properly subject to forfeiture, arguing only for the return of what he claimed was lawfully obtained or imported (App. 28-29). In light of that admission, the only issue presented at the hearing, as the district court stressed (App. 53, 61-62), was whether the semen claimed to have been lawfully obtained was so "commingled" with the smuggled quantities as to be also subject to forfeiture. See 19 U.S.C. 1592,[3] 1595a;[4]

States "by means of any fraudulent or false invoice, * * * any false statement, * * * or * * * any false or fraudulent practice" is subject to forfeiture. 18 U.S.C. 545 provides that merchandise introduced into the United States by fraudulent means or otherwise contrary to law "shall be forfeited to the United States."

[3]Section 1592 provides for forfeiture not only of the goods illegally imported, but of the "whole of the merchandise or the value thereof in the case or package containing the particular article or articles of merchandise to which such fraud or false paper or statement relates."

[4]Because petitioner commingled the stolen semen with semen he had declared, to avoid paying duty on the former, forfeiture of the entire contents of the eight canisters also would be authorized under Section 1595a, which provides in pertinent part: "[E]very vessel, vehicle, animal, aircraft, *or other thing used* in, to aid in, or to facilitate * * * the importation * * * of any article * * * into the United States contrary to law * * * shall be seized and forfeited * * *" (emphasis added).

Buckley v. *United States*, 4 How. 251, 262.[5] The resolution of that factual question against petitioner plainly does not call for review by this Court.

Moreover, because of petitioner's concession in the district court, the government was not called upon to make a factual record to explain its delay in initiating the forfeiture proceeding.[6] Accordingly, this in not an appropriate case for this Court's consideration of the question of timeliness in forfeiture actions, or the proper remedy if the government is deemed guilty of laches.

In any event, petitioner can show no prejudice resulting from delay. Unlike the usual situation, he had, within five months of the seizure, admitted facts which precluded any defense to forfeiture. And he has not asserted that the government's delay prevented him from adducing any relevant evidence at the hearing held in April 1977. In

[5]In *Buckley*, the Court said (4 How. at 262):

> [T]he jury * * * [is] not restricted in the condemnation of the goods to any entered goods which they [find] undervalued, but * * * they might find either the whole package or the invoice forfeited, though containing other goods correctly valued, if they should find that such package or invoice had been made up with intent to defraud the revenue of the United States.

[6]The semen was not retained as evidence only for the United States criminal proceedings. Criminal charges were brought against petitioner by Canadian authorities in regard to the bull semen that had been stolen from United Breeders of Canada (App. 6) and that case was not concluded until the fall of 1975. In addition, the government was restrained by the district court. In October of 1975 from destroying any of the semen, pursuant to a civil action brought by the Pennsylvania Holstein Association, in which that Association claimed rights to certain of the semen. That action was not disposed of until December 30, 1975, when it was dismissed by stipulation (Government's Brief on Appeal, Exhibits A and B).

those circumstances, we submit, it would be inappropriate to vacate the forfeiture even if the government had been too slow.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7] The Court has held that the remedy for a violation of the Due Process Clause because of failure to hold a hearing should be no more than necessary to compensate for injury inflicted by the deprivation. *Carey* v. *Piphus*, No. 76-1149, decided March 21, 1978. See also *Codd* v. *Velger*, 429 U.S. 624 (no hearing was necessary where plaintiff did not contend that the absence of a hearing caused or increased the possibility of a mistaken decision). Consequently, a showing of prejudice should be a minimum prerequisite where, as here, petitioner seeks a remedy (cancellation of the forfeiture proceeding and return of the seized articles) that is considerably broader than simple compensation for delay.